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Secured Transactions

A Context and Practice Casebook

Edith R. Warkentine

WESTERN STATE COLLEGE OF LAW

Jerome A. Grossman

GRESHAM SAVAGE NOLAN & TILDEN



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To my husband, Erich, and our two wonderful children, Evan and Ellen. Your love and support make it all worthwhile! —E.R.W.

I would not be in a position to have participated in this project at all had my wife of 41 years, Mary O'Brien Grossman, when I first approached her back in 1977 with the proposal that I go to law school, put the kibosh on the idea. Instead, she allowed me to quit my job, sell our house, and move the family to Berkeley. Since then, in all ways, she has encouraged me to do the work that I enjoy. I cannot thank Mary enough. —J.A.G.

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Series Editor's Preface

Welcome to a new type of casebook. Designed by leading experts in law school teaching and learning, Context and Practice casebooks assist law professors and their students to work together to learn, minimize stress, and prepare for the rigors and joys of practicing law. **Student learning and preparation for law practice are the guiding ethics of these books.**

Why would we depart from the tried and true? Why have we abandoned the legal education model by which we were trained? Because legal education can and must improve.

In Spring 2007, the Carnegie Foundation published *Educating Lawyers: Preparation for the Practice of Law* and the Clinical Legal Education Association published *Best Practices for Legal Education*. Both works reflect in-depth efforts to assess the effectiveness of modern legal education, and both conclude that legal education, as presently practiced, falls quite short of what it can and should be. Both works criticize law professors' rigid adherence to a single teaching technique, the inadequacies of law school assessment mechanisms, and the dearth of law school instruction aimed at teaching law practice skills and inculcating professional values. Finally, the authors of both books express concern that legal education may be harming law students. Recent studies show that law students, in comparison to all other graduate students, have the highest levels of depression, anxiety and substance abuse.

The problems with traditional law school instruction begin with the textbooks law teachers use. Law professors cannot implement *Educating Lawyers* and *Best Practices* using texts designed for the traditional model of legal education. Moreover, even though our understanding of how people learn has grown exponentially in the past 100 years, no law school text to date even purports to have been designed with educational research in mind.

The Context and Practice Series is an effort to offer a genuine alternative. Grounded in learning theory and instructional design and written with *Educating Lawyers* and *Best Practices* in mind, Context and Practice casebooks make it easy for law professors to change.

I welcome reactions, criticisms, and suggestions; my e-mail address is mhschwartz@ualr.edu. Knowing the author(s) of these books, I know they, too, would appreciate your input; we share a common commitment to student learning. In fact, students, if your professor cares enough about your learning to have adopted this book, I bet s/he would welcome your input, too!

Michael Hunter Schwartz, Series Designer and Editor
Consultant, Institute for Law Teaching and Learning
Dean and Professor of Law, William H. Bowen School of Law,
University of Arkansas at Little Rock

Preface

This student-centered book draws on a wide variety of teaching materials that Professor Warkentine developed over a twenty-plus-year teaching career plus “real world” problems drawn from Mr. Grossman’s thirty years of experience as an expert secured transactions practitioner. Professor Warkentine is indebted to generations of law students who challenged her to find effective ways to introduce difficult and often obtuse material. Our three primary objectives are:

- To help law students further develop analytical skills, with a particular emphasis on statutory interpretation;
- To provide students with an opportunity to master the substantive law of Article 9 of the Uniform Commercial Code; and
- To expose students to how the doctrine learned in this class translates into an exciting and intellectually challenging legal career.

Book Organization and Coverage

This book begins with a quick overview of the entire UCC. Because statutory analysis is at the core of the course, the book then discusses how to read and apply a statute. Following is an overview of UCC Article 9 and the law of secured transactions in general, including the role of attorneys in secured transactions. Doctrine is then introduced in the order that students should follow when analyzing a secured transactions problem. After all of the doctrinal material has been covered, the final book chapter presents a series of problems that will help students to review and “put it all together.”

After the three introductory chapters, each chapter follows the same organizational approach. Beginning in Chapter 4, each chapter begins with an Article 9 Graphic Organizer, depicting the overall coverage of Article 9. The organizer is highlighted to identify the subject studied in that chapter, and to help you remember where that subject fits in the “big picture.” Following the Graphic Organizer is a Chapter Problem, which helps put the chapter material into context. Next is a list of the code sections to be studied in that chapter. Each chapter includes descriptive text, one or two cases or excerpts from cases, and several smaller exercises that draw on the material studied in that chapter and require students to select and apply the applicable code sections to solve the problems. At the end of the chapter is a list of additional resources, including ALR annotations, law review articles, and cases. None of these additional resources are required reading. These are sources for those students who always come up after class and request some additional reading. If you are not one of those students, you can easily be successful in this course without ever consulting any of the cited material.

Professor Douglas Whaley, a renowned professor and himself the author of seven textbooks on contracts and commercial law, suggested that when writing a textbook, the

author follow this basic guideline: “Give the students enough understanding that they know the basics and can avoid malpractice by looking up the subtleties when they arise later in life. If you teach too many details, the students end up overloaded and top heavy so that the basics elude them.”¹ We have followed that guideline in this book; as a result, not every section of Article 9 is discussed, nor is there an exercise or problem illustrating every legal issue raised in Article 9. However, the book teaches you all of the tools you will need successfully to attack an Article 9 problem.

Appendices

Because one of our goals is to introduce students to the practical aspects of a secured transactions practice, we have included in the Appendices a variety of forms that might be used in a typical secured transaction. These forms are not intended to be used as models, and are certainly not “forms” to be followed; rather, they are presented for their educational value; they provide a starting point for discussion and illustrate specific problems confronting the practicing lawyer.

How to Use This Book

This book is deceptively short. The “star” of the book is the text of the Uniform Commercial Code, and its Official Comments. You must purchase and use a complete version of the text of the Code and the Comments. You will need to spend a significant amount of time reading the statute and the Official Comments. For emphasis, we have included excerpts of text and comments in the book.

This book does include cases, but only a limited number of them, and the cases that we include have not been heavily edited. We have, however, omitted many footnotes. When footnotes are included we have placed them in brackets [] within the text. The purpose of including cases in this format is to prepare you to read cases as lawyers read cases—unedited—and to prepare you to use the cases as lawyers use cases—to solve problems.

To get the most out of this book, read the Chapter Problem as you begin each new chapter. You will not be prepared to analyze the problem fully until you have completed the entire chapter, but reviewing the Chapter Problem initially will help to provide context for the material you will be studying. Next, read each of the code sections indicated for that chapter, along with the Official Comments. Read difficult code sections aloud. Deconstruct each section. Do not skip this step! Students who are successful in Code courses all emphasize that they spent a lot of time reading the statute and the Official Comments. In addition, be sure that you have your Code open and that you refer to it frequently as you read the text that explains each code section.

After you have completed the assigned reading, including the Code, you are ready to read and prepare your answers to the chapter exercises. We purposely do not indicate what code sections you will have to consult to work through the exercises—learning how to find the appropriate code section is an essential part of what this course is about. In

1. Douglas J. Whaley, *Commentary: Teaching Law: Thoughts on Retirement*, 68 OHIO ST. L. J. 1387, 1400 (2007).

class, be prepared to discuss how you selected the applicable code sections and how you applied them to reach a conclusion. Work on the shorter exercises first. When you think you have mastered the material in the chapter, return to the Chapter Problem and try to write out a complete analysis.

This book uses visual aids extensively to help students picture how the individual code sections fit together to reach a conclusion. Students who do not customarily use visual aids such as those contained in this book find them to be extremely helpful. Many students who customarily prepare their own flowcharts continue to prepare their own material, but they tell us that they nevertheless use the figures in the book to help them refine their own work. **All students should always keep in mind that the original sources, the statute and the Official Comments, are the primary authority on which they should rely for analysis.** Everything else can be used, if helpful, but never to the exclusion of the statute itself.

Edith R. Warkentine

Jerome A. Grossman

July, 2014

Acknowledgments

This student-centered book is my second in the Carolina Academic Press Context and Practice series. Students who took my Secured Transactions class after taking my Sales class (where I used my CAP Sales book) urged me to write my own book. I was reluctant to do so, because Article 9 and Secured Transactions practice have changed significantly since I was last in practice. However, Jerry Grossman, a distinguished practitioner whom I met in the context of work for the California State Bar, was kind enough to agree to be my co-author for this book. I think it is particularly appropriate for a practitioner to co-author a text for the Context and Practice series. As a result of our collaboration, we have created a text that is truly unique among other available texts. The perspective of most of the questions is that of a transactional lawyer preparing for client meetings, interviews and negotiations. So I must first thank Jerry for agreeing to do this with me and for his terrific contributions.

Next, I thank the “early readers” of the text: my husband, Erich, and my colleague, Professor Elizabeth N. Jones, the director of our school’s Criminal Law Practice Center and herself an expert in criminal law and procedure. When I wrote the Sales book I learned that willing readers without a legal background or without a legal background in the substantive area in which I write, can make important contributions to the readability of the text. If they can understand the text, it will be accessible to our students as well. I think law professors sometimes assume that law students have background that we would not assume a lay person has. Accordingly, by having a lay person and a non-expert read the book, we were forced to explain context in a user-friendly way. My husband, who has served as my “reasonable man” since I went to law school, has always scrutinized my work to be sure it was accessible to students, and his contribution this time was invaluable. Professor Jones, who has more than enough on her plate, and could easily have refused to help due to time constraints, nevertheless was generous with her time; she read critically and gave excellent input on a timely basis. I can’t thank her enough!

As I learned in the past, it “takes a village” for me to write a book! I want to thank my secured transactions students, Western State College of Law Class of 2013, who urged me to write this book, and particularly the five students who served as my research assistants in the early stages: Kyle Adamson, Joseph Chaparo, Steven Giammichele, Amanda Huff, Alex Nguyen, and Michael Valentine. I also want to thank all of the students in my Spring 2014 Secured Transactions class, who were the “beta site” for this book.

I am again indebted to Professor Sidney DeLong, Seattle University School of Law, who graciously shared with me the materials he created and uses in his own classes. I have always thought his discussion of how to analyze a statute is one of the best I’ve seen, and he has been kind enough to permit me to adapt and use that discussion in Chapter 2 of this book.

Finally, words cannot express my appreciation of Jacqueline Alvarino, who went above and beyond, doing meticulous work in typing and editing the manuscript. Her thoughtfulness and attention to detail while maintaining a wonderful attitude were remarkable. This book simply would not have happened without her.

Edith R. Warkentine, July, 2014

My major professional thanks, of course, must go to Professor Edith Warkentine, who invited me to participate in this project, who wrote the initial draft of every chapter and cheerfully accepted my kibitzing, who taught the course and took that opportunity to vet the material, and who ensured that we timely produced a completed manuscript. I also echo her thanks to everyone who assisted with the production of this text.

I acknowledge, too, the many mentors who shaped my career, making it possible for me to enter the field of secured transactions, for which I have been temperamentally well-suited: Professor Peter Winship, the visiting professor from Southern Methodist University who first introduced me to the UCC; Paul J. Mundie, my initial partner assignment and mentor at Heller Ehrman, who encouraged me to remain in the Corporate Department and fostered my interest in commercial finance; David A. Rosinus, with whom I worked closely for almost the entire 14 years that I was with Heller Ehrman, who actively supported my desire to focus my practice on commercial finance and whose rigorous approach to legal analysis demanded that I “show my work”—to map out the analytical steps that I took to move from statement of an issue to resolution (one of the pedagogical tools espoused by this text); Steven O. Weise (a name familiar to everyone whose practice involves secured transactions), with whom I had the good fortune to cross paths, not only as a colleague at Heller Ehrman, but also as a participant in various bar projects, and who has allowed me to importune him whenever I’ve had a question I wanted to bounce off someone who has seen it all; Michael T. Andrew, former partner and counsel at Luce Forward Hamilton & Scripps (now merged into McKenna Long & Aldridge), another proponent of rigorous analysis and willing consultant; Harry C. Sigman, permanent member of the State Bar Business Law Section’s Commercial Transactions (nee “UCC”) Committee (among many other things), who has periodically reached out to keep me involved in matters affecting the UCC, as enacted in California.

Jerome A. Grossman, July, 2014